Supreme Court, U.S.
FILED

No. 98 929 AUG 11 1998

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

RICHARD D. WHITE, - - - - - *Petitioner,*

versus

COMMONWEALTH OF KENTUCKY, - *Respondent.*

SUPPLEMENTAL APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF KENTUCKY

THEODORE H. AMSHOFF, JR.
Counsel of Record for Petitioner
PAUL P. CLEMENS
AMSHOFF & AMSHOFF, P.S.C.
Ninth Floor
200 West Broadway
Louisville, Kentucky 40202
Phone: (502) 540-0060
Counsel for Petitioner

August 11, 1998

WESTERFIELD-BONTE CO., 619 W. KENTUCKY–P.O. BOX 3251, LOUISVILLE, KY.

APPENDIX C

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

No. 97-CA-2231-D

RICHARD D. WHITE MOVANT

V. ON MOTION FOR DISCRETIONARY REVIEW
FROM CRITTENDEN CIRCUIT COURT
ACTION NO. 8-XX-1

COMMONWEALTH OF KENTUCKY RESPONDENT

*** *** ***

ORDER

BEFORE: GUIDUGLI, JOHNSON, and SCHRODER, Judges

Having considered movant's motion for enlargement of time in which to file a motion for discretionary review, and being otherwise sufficiently advised, this Court ORDERS that this motion be, and it is hereby, DENIED. The Clerk of this Court is ORDERED to RETURN movant's tendered motion for discretionary review on this date.

ENTERED: Nov 6, 1997 /S/
JUDGE, COURT OF APPEALS

APPENDIX D

COMMONWEALTH OF KENTUCKY
CRITTENDEN CIRCUIT COURT
Case No. 97-XX-00001

RICHARD D. WHITE **APPELLANT**

V.

COMMONWEALTH OF KENTUCKY **APPELLEE**

Appellant, Richard D. White (White) appeals from a judgment of the Crittenden District Court convicting him of the offense of driving under the influence (KRS 189A.010) pursuant to his plea of nolo contendere, and after a suppression hearing in which the District Judge overruled his motion to suppress certain blood alcohol evidence.

The undisputed facts reveal that White, a probationary Kentucky State Police Officer, on August 16, 1996, after a day of golf during which he drank some beer, overturned the truck he was driving n a public highway, causing him to be hospitalized at Crittenden County Hospital with serious injuries.

At the suppression hearing Donald Arflack, rescue chief for the hospital rescue squad testified that he saw White at the scene of the accident and was present at the hospital during part of a conversation between White and Lt. Steven Humphries, lead investigating officer of the case. He testified that Humphries asked "about drawing a blood alcohol and he told Rick that it would be used for administrative purposes only." He was then asked to leave the room but was watching through a window and saw White sign the consent form for the test and saw the blood drawn.

Lt. Humphries testified that he smelled alcohol while talking to White in his hospital room and asked him if he'd been drinking. White admitted that he had. Humphries requested the blood alcohol test and White hesitated. There was a conversation just between the two during which "several what ifs" came up. Humphries testified that he told White if the test "comes back a 04 or 05, then it will only be used for administrative purposes only." Humphries suggested some administrative possibilities should the test be 04 or 05, such as reassignment. He then got a consent form which was signed by White, and the blood sample was drawn. Humphries testified that in none of the discussions did he tell White that the blood samples would not be used for criminal prosecution should such be warranted, and that there was no discussion about what would happen if the blood alcohol content exceeded .10. White's test result was .18.

Crittenden County Sheriff, Floyd Andrews, testified that while in White's room he heard Humphries tell White that if he would submit to a blood test, he would use it for administrative purposes only. The Sheriff then left the room and did not hear subsequent conversations between White and Humphries. White was never placed under arrest. A few days later White was discharged from the Kentucky State Police and criminal charges were brought against him which resulted in this appeal.

The crux of this case is whether White voluntarily consented to the blood alcohol test, thereby negating the need for a search warrant. White contends his consent was not voluntarily given because he was deceived by the Commonwealth (Lt. Humphries) as to its intended use of the sample. The District Court did not believe or find that any such deception occurred. This Court finds no abuse of discretion in that finding or that the District Court was clearly erroneous. A simple reading of the transcript of the suppression hearing shows that the Court could have found either way.

In order to find for White, the Court would have to disbelieve the testimony of Lt. Humphries concerning all the conversations with White after everyone else had left the room. All the other testimony related to only part of the exchange between White and Humphries because those witnesses were not privy to all of the conversations.

The testimony indicates that rather than deceptive promises being made by Humphries to White, it was White who initiated the conversation about what would happen to him if his test did come back 04 or 05. It is clear that White believed that his test would be low and that all he had to worry about was how it would affect his employment as a state trooper. But the test came back four times higher than he expected. It is understandable that he then wished he had not consented.

White also argues that under Commonwealth v. Montgomery, the blood alcohol test should have been suppressed because it was taken over three hours after the accident. This Court has carefully reviewed Commonwealth v. Wirth, and agrees with White that the ruling in that case does not vitiate this Court's ruling in Montgomery. Surely no one argues that the Court cannot exclude evidence collected at a time or place so remote from the circumstances of the crime charged as to render it unreliable as a matter of law. The Wirth case simply dictates that each case be determined upon its on facts and circumstances.

In the present case, where over three hours elapsed before the test was taken, the chance of unreliability is great indeed. However, considering the totality of the circumstances which include the facts that from the time of his driving until the drawing of the sample three hours later, White was either unconscious or confined in an ambulance or hospital room in the presence of medical attendants and/or other officers of the law, the Court finds the delay not to be unreasonable.

WHEREBY IT IS HEREBY ORDERED that the opinion and judgement of the District Court is AFFIRMED.

This is a final and appealable order.

ENTERED this August 7, 1997.

/S/
Tommy W. Chandler
Crittenden Circuit Judge

MAIL COPIES TO:

Hon. Tommy W. Chandler
Counsel of Record
Hon. C. Rene Williams

APPENDIX E

COMMONWEALTH OF KENTUCKY
CRITTENDEN DISTRICT COURT
Case No. 96-T-00286

COMMONWEALTH OF KENTUCKY PLAINTIFF

V. ORDER

RICHARD D. WHITE DEFENDANT

This matter is before the Court upon the Defendant's Motion to suppress the results of blood testing performed by Crittenden County Hospital. The Defendant also moves to dismiss for failure to set forth any grounds for probable cause in the complaint for Driving Under the Influence. Both parties have submitted legal authority in support of their respective positions.

This case involves an incident occurring on August 16th, 1996, in Crittenden County. The Defendant is charged with unlawfully operating a motor vehicle under the influence of intoxicating beverages on Highway 91 in Crittenden County. This complaint is signed by Captain Ron Algood of the Kentucky State Police.

The Defendant's motion to suppress is based on the "two (2) hour rule" previously adopted in this judicial district. The Circuit Court Judge of this district ruled in the case of Montgomery v. Commonwealth, Webster Circuit Court, Case No. 95-XX-00002, that a breathalyzer result or other chemical alcohol test result where the test was given more than two (2) hours after the act of driving by the Defendant is not admissible.

This same issue was addressed in another recent case in Crittenden County and the Commonwealth submitted a brief challenging that ruling as has also been done in this case. Then, two (2) days after the defendant mailed these motions, the Kentucky Supreme Court rendered a decision certifying several

points of law in D.U.I. cases.

This case, Commonwealth v. Wirth, ____ S.W. 2D ___, S. Ct. 1996, deals with questions directly related to the facts of this case. This Court, in reviewing the Commonwealth's argument and following the rationale of the Wirth case, ruled that the"two-hour" rule was no longer applicable in the 5th Judicial District. The Court sets forth it's discussion of this issue in the case of Commonwealth v. Theresa Hodge, a Crittenden County Case No. 96-T-00222:

DISCUSSION AND LAW

> The basis of the Defendant's motion to suppress lies in the case of Montgomery v. Commonwealth, Webster Circuit Court, Case No. 95-XX-00002. In this case, the Circuit Court ruled a test result taken more than two (2) hours after the alleged act of driving is inadmissible. This decision has not been challenged until the case herein when the Commonwealth filed an objection to Defendants motion to suppress. The Commonwealth points out that the Montgomery ruling is based only on a Ohio Statue cited by the defense as there was no response filed by the Commonwealth in Webster County.
>
> It is further noted that the "two-hour" rule has been codified by Ohio Statue {4511.19(d)}. Kentucky had adopted no such statute and so far, most Courts have decided this issue on a case-by-case basis. Further, the Newark case did not hold this as an absolute rule as blood withdrawn more than two hours after the time of the alleged violation may be admissible with supporting expert testimony.

The Kentucky Supreme Court has recently "certified the law" relating to several commonly dealt with issues in D.U.I. cases in the case of Commonwealth v. Michael Alan Wirth, S.W.2d ____, (Kentucky Supreme Court 1996). The Court held in regard to the consideration of extrapolation evidence and the time lapse issue as follows:

> Rhetorically, we have been asked when the lapse of time between driving and testing for alcohol intoxication becomes so great as to prevent a rational trier of fact from determining guilt based thereon. In this case we need not attempt to formulate a bright line rule nor anticipate every possible state of facts which might arise. For our purposes it is sufficient to say that the evidence presented here in support of a per se violation easily met the "beyond reasonable doubt" standard. While a trier of fact, whether it be a trial court or a jury, may have the power to disregard a compelling evidence or impose a standard of its own which is so great as to be incapable of satisfaction, such power does not logically validate the result. Measured against proper standards of evidentiary analysis, the decision of the trial court was in error.

Therefore, based upon the law as set forth by the Supreme Court of Kentucky in Commonwealth v. Wirth, the issue of the delay of time in this case is a proper issue for consideration by the finder of fact (jury).

The Court, therefore, adopts the same ruling in the case herein, Overruling the "two-hour rule" and overruling the Defendant's Motion to suppress the blood test results.

Next, the Defendant moves to dismiss based on a deficient complaint per Giordenella v. United States, 357 U.S. 480, 2 L.Ed.2d 1503 (1958).

The necessary requirements for a criminal complaint are set forth in RCr 2.02, wherein it states "the complaint is a written statement of the essential facts constituting the offense charged". In Kentucky, the citation or other charging instrument should generally advise the Defendant of the nature of the charge against him. It is not necessary to detail the essential factual elements although this is commonly provided. Howard v. Commonwealth. 554 S.W.2d 375 (Ky. 1977).

The elements of KRS 189A.010 applicable to this case are that a person:

(1) Operate , or be a physical control of, a motor vehicle anywhere in this state

(2) (a) While the alcohol concentration in his blood or breath is 0.10 or more grams of alcohol per 100 milliliters of blood or per 210 liters of breath, or

(b) While under the influence of alcohol

This particular complaint, while not full of explicit details, does state sufficient facts to apprise the Defendant he is accused of operating a motor vehicle while under the influence of intoxicating beverages on Highway 91 in Crittenden County, on August 16th, 1996. This provides him with the necessary information to begin preparation for his case, which is the basic reasoning for requiring such information.

WHEREFORE, the Court hereby OVERRULES both the Defendant's Motion to Suppress and Dismiss. This case will remain on the Court docket for a pretrial conference on

February 26th, 1997 at 10:00 a.m. and a jury trial on March 12th, 1997 at 10:00 a.m.

This the 6 day of February, 1997.

/S/

Rene Williams
Crittenden District Judge